

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27-4-2007

Coram

The Honourable Mr. Justice K. VENKATARAMAN

WRIT PETITION No.1488 of 2001

K.Jayapal

.. Petitioner

Vs.

1. Union of India rep. by its
Secretary to Government
Ministry of Labour,
New Delhi

2. Assistant Labour Commissioner(C) I,
Office of the Regional Labour
Commissioner (Central)
26, Haddows Road, "Shastri Bhavan"
Chennai-600 006

3. State Bank of India
rep. by its Assistant General Manager
No.21, Rajaji Road,
Chennai-600 001

.. Respondents

This writ petition is filed under Article 226 of the Constitution of India, praying for the issue of a writ of Certiorarified mandamus as stated therein.

For Petitioner : Mr.R.Kamatchi Sundaresan

For Respondents : Mr.K.S.Sundar -R3
No appearance -R1 and R2

O R D E R

The present writ petition has been filed by the petitioner for the issue of certiorarified mandamus , to call for the records relating to the order of the first respondent dated 5.1.2001 bearing No.L-12012/338/2000/IR(B-I) and to quash the same and consequently direct the first respondent to refer the dispute of the petitioner for adjudication before the appropriate Central Government Industrial Tribunal, Chennai.

2. The short facts which require for the disposal of the writ petition are as follows:

The petitioner has joined the services of the third respondent/bank as a clerk in the year 1985. Initially, he was working at Pannur, Chittoor District, Andhra Pradesh. Thereafter, he was transferred to Chennai and he was working in the local Head Office of the Management. In the year 1994, he developed certain mental problem which could not be diagnosed by the Medical Officer of the Bank in spite of him undergoing several tests suggested by them. The disease got aggravated during the year 1995 and it had gone beyond his control during the year 1996. Therefore, he has applied for medical leave during the year 1996 and he was attending duty only intermittently.

3. While so, without his conscious and without his knowledge, he has submitted the resignation letter and the same was accepted by the Management and he was relieved from the duty. On recovery, he came to know that without his knowledge, he has submitted the resignation letter and requested for re employment. But the same has been rejected by the third respondent by its letter dated 22.9.1999 on the ground that his resignation was accepted and terminal benefits were received by the petitioner. Further, on 29.10.1999, a representation made by the petitioner which has also been rejected on 8.12.1999 by the third respondent.

4. Hence, the petitioner had raised an Industrial Dispute before the Assistant Commissioner of Labour(C) Chennai /Second respondent herein, challenging his non employment under Section 2-A of the Industrial Disputes Act 1947. The bank had filed a reply stating that the resignation letter submitted by the petitioner has been accepted and terminal benefits have been paid to the petitioner. The Assistant Commissioner of Labour who has initiated conciliation proceedings, submitted failure report. Pursuant to the same, the first respondent without referring the dispute for adjudication, on irrelevant and vexatious grounds, declined to refer the dispute by its order dated 5.1.2001. Challenging the same, the petitioner has preferred the above writ petition.

5. The counter affidavit has been filed by the third respondent wherein it has been set out that the petitioner submitted his resignation letter on 21.11.1996 for personal reasons. The petitioner was thereafter counselled against the resignation letter but it did not yield any result and again the petitioner has submitted another letter dated 13.01.1997 ie., after two months of the first letter. The same has been accepted and the petitioner was relieved on 12.2.1997.

6. The petitioner, thereafter, submitted a letter dated 3.3.1997 for grant of encashment of leave. After a period of four months, the petitioner received his terminal benefits on 10.6.1997 and hence the entire allegations contained in the writ petition is incorrect and false. After two years, the petitioner has sent a letter dated 29.10.1999 demanding employment. The petitioner, thereafter, raised conciliation proceedings and industrial dispute and in the said

circumstances, the respondent has filed a detailed counter setting out all the facts in detail. Hence the proceedings failed and the conciliation officer submitted his failure report. Thereafter, the appropriate Government refused to refer the matter under Section 2(A) of the Industrial Disputes Act on the ground that the petitioner was not a workman. Thus, the sum and substance of the reply affidavit filed by the third respondent is that the petitioner having voluntarily resigned and received terminal benefits, is not entitled to raise any Industrial Dispute.

7. On the above pleadings, the learned counsel appearing for the petitioner as well as the learned counsel appearing for the respondents have made their submissions.

8. The learned counsel appearing for the petitioner contended that a) the first respondent exceeded its jurisdiction by holding that it is not proper on the part of the petitioner to claim reinstatement in December 1999 after having accepted the terminal benefits in June 1997. b) The first respondent ought to have referred the dispute for adjudication as the very resignation is under dispute as the same had happened when the petitioner was suffering from mental depression and the same can be ascertained only by letting evidence and that the first respondent cannot adjudicate the petitioner's dispute. c) The first respondent exceeded its jurisdiction by adjudicating the petitioner's dispute by saying that he has not produced any material. d) The first respondent pursuant to the failure report is duty bound to refer the dispute raised by the petitioner, and has no power to adjudicate the dispute on merits.

9. Per contra, the learned counsel appearing for the third respondent contended that a) when the petitioner has voluntarily submitted his resignation letter and received his entire terminal benefits, he has no power to seek re-employment. b) The appropriate Government under the facts and circumstances of the case came to the conclusion that the petitioner was not a workman prima facie and that there was no Industrial Dispute and consequently did not make any reference. c) Since the third respondent/bank did not terminate the service of the petitioner, no industrial Dispute has arisen. d) The appropriate Government did not adjudicate the merits but only ascertained the eligibility of the petitioner and the maintainability was ascertained and it is as per law.

10. The facts of the case coupled with the submissions made by the learned counsel appearing for the petitioner and the third respondent has to be analysed to find out whether the impugned order of the first respondent requires to be set aside.

11. It is an admitted case that the petitioner has submitted his resignation letter to the third respondent, the same has been accepted by the third respondent and the terminal benefits have been settled to the petitioner on 10.6.1997. Thereafter, after two years, the petitioner has sent a letter dated 29.10.1999 demanding re-employment.

Further the conciliation proceedings failed and the first respondent refused to refer the dispute for adjudication since the first respondent felt that it does not consider the dispute fit for adjudication. The said order of the first respondent is extracted as follows:

"It is not proper and legal on the part of the disputant to claim reinstatement in Dec.,1999 after having accepted the terminal benefits in June,1997. Besides, the disputant has not produce any documentary evidence that he was undergoing protracted treatment. Hence, no dispute."

12. The learned counsel appearing for the petitioner contended that the first respondent is bound to refer the dispute raised before it and cannot be adjudicated by the first respondent on merits. The adjudication has to be done only by the Industrial Tribunal and not by the first respondent. He relied on a decision reported in Sharad Kumar-vs- Government of NCT of Delhi and others(2002 -II-LLJ, Supreme Court,275). In the said case, the question arose was that the appellant therein was designated as Area Sales Executive and performing the duties of Area Sales Executive, as such he is not covered by the definition of "Workman" as defined under Section 2 (s) of the Industrial Disputes Act, 1947. The reason to refuse to make a reference in that case was that since the appellant therein was working as Area Sales Executive, he is not a workman within the definition of "workman" as defined under Section 2(s) of the Industrial Disputes Act. Hence the finding rendered thereon may not be helpful to the case on hand.

13. In the same Judgment at paragraph 27, their Lordships have clearly held as follows:

" In the case of Telco Convoy Drivers Mazdoor Sangh and another v. State of Bihar and others, AIR 1989 SC 1565: 1989 (3)SCC 271:1989-II-LLJ 558, this Court construing the provision of Section 10(1) held as follows at pp.560 and 561 of LLJ.

"13. Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under Section 10(1) of the Act, the function of the appropriate Government is an administrative function and not a judicial or quasi-judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act. See Ram Avtar Sharma.v.State of Haryana. AIR 1985 SC 915: 1985 (3)SCC 189: 1985-II-LLJ,187; M.P.Irrigation Karamchari Sangh .v. State of M.P. AIR 1985 SC 860:1985 (2) SCC 103: 1985 -I-LLJ -519, Shambhu nath Goyal. v. Bank of Baroda, Julllllundur, AIR 1978 SC 1088:1978 (2) SCC 353: 1978 -I-LLJ-484.

14. Applying the principle laid down by this Court in

the above decisions, there can be no doubt that the Government was not justified in deciding the dispute. Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function under Section 10(1) of the Act. As has been held in M.P. Irrigation Karamchhari Sangh case, there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further the Government should be very slow to attempt an examination of the demand with a view to declining reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes, and that to allow the Government to do so would be to render Section 10 and Section 12(5) of the Act nugatory."

In the above said decision, their Lordships have clearly held that the State Government merely taking note of the designation of the post held by the workman i.e., Area Sales Executive and the said question has to be decided by the Tribunal and not by the appropriate Government. But in the case on hand, the said situation has not arisen. The case on hand pertains to the resignation of workman, who later wants re-employment.

14. The learned counsel appearing for the petitioner relied on another decision reported in Philips India, Ltd., and another vs. P.N. Thorat, Assistant Commissioner of Labour and Conciliation Officer and others (2006(2) L.L.N. 604). In the said case, the grievance was that there was short fall in payment of VRS amounts and the employees were paid less commuted amounts and monthly pensions than what was promised in the settlement. It was urged on behalf of the Union in that case that the management had committed breach of said settlement by defrauding the employees by not paying agreed amount of compensation. Taking into account such plea raised thereon, a Division Bench of Bombay High Court has taken a view that there are serious triable issues and the same has to be agitated before the Industrial Tribunal. The facts and circumstances of that case are totally different from the facts of the present case. Hence the said Judgment is also not helpful to the petitioner.

15. Yet another decision relied on by the learned counsel for the petitioner is M. Sudalai Andi and others vs. Government of India (Represented by its Secretary, Ministry of Labour) New Delhi and another (2006(3) LLN 887). In the said case, the petitioners therein claim their age of retirement under the second respondent was 60 years and the second respondent superannuated the petitioners at the age of 58 years. Thus the said reduction of age by the second respondent from 60 years to 58 years has been referred to the Conciliation Officer, who has submitted failure report and the first respondent therein has not

referred the matter to the Labour Court and hence the writ petition has been filed questioning the said order. In the above said Judgment, the learned Judge has allowed the writ petition with a direction to the first respondent to refer the dispute raised by the respective petitioners before the Industrial Tribunal. But in the case on hand, as stated already, the facts and circumstances of the case is entirely different. In the present case, as I have already referred, the petitioner has submitted his resignation letter and thereafter he had received the entire terminal benefits and now seeking re employment. The first respondent, after considering the plea of the petitioner came to the prima facie conclusion that the petitioner after having accepted the terminal benefits in June 1997 cannot seek reinstatement in December 1999 and that he has not produced any material evidence that he was taking protracted treatment. The said findings arrived at by the first respondent cannot be said to be perverse or frivolous. The appropriate Government on a proper examination of the demand, can come to the conclusion that the demand is either perverse or frivolous and do not merit a reference. The Government can prima facie consider the merit of the case before deciding whether the reference should be made or not?

16. If the reason given by the Government is irrelevant and extraneous, the Court can strike down the order of the Government. A reading of Section 10(1) and Section 12(5) of the Industrial Disputes Act makes it clear that the appropriate Government has a discretion to decide whether the reference should be made or not even in case whether the Industrial Dispute exists or is apprehended. Thus in order to make a reference, there must be prima facie existence of an Industrial dispute. In this connection the learned counsel appearing for the petitioner cited a decision reported in *M/s Shaw Wallace & Co., Ltd., -vs- State of Tamil Nadu* represented by the Commissioner and Secretary, Labour Dept. and others-(1987 LLJ 177) wherein in paragraph 14 the Division Bench of this Court has held as follows:

" The discretion given in Section 10(1) read with Section 12(5) of the Act has, therefore, to be exercised in such a manner that it would not exceed the limits prescribed for the sphere of reference and enter into the territory of adjudication. What the Government is expected to decide before making a reference is whether on a prima facie examination of the facts of the case, there is a dispute which requires a trial or adjudication by a Tribunal or a Court. If there is any matter which requires to be adjudicated, then the Government cannot take upon itself the function of such adjudication and refuse to refer the matter. If on the other hand, the Government comes to the conclusion that the claim made is so patently frivolous or that the admitted facts are so glaringly against the workmen, which would not warrant a trial or adjudication by a Court or Tribunal, then the Government would be justified in refusing to make a reference. Similarly, if the claim is stale and belated, it need not be referred for

adjudication. There may also be cases where a reference would not be conducive to industrial peace in the region or would have an adverse impact on the general relation of employer and employee and in such cases also the Government would be justified in refusing to make a reference."

In the same Judgment in Paragraph 11, the Division Bench of this Court has held as follows:

" The position before the introduction of Section 2-A of the Act was that a dispute between an employer and an individual workman could not per se be an industrial dispute. But , it could become one if it was taken up by a union or a number of workmen making a common cause with the aggrieved individual workman. The Section was introduced in order to make the machinery under the Act available to cases in which individual workmen were discharged, dismissed, retrenched or whose services were otherwise terminated. While introducing the Section, the legislature though fit to bring in a fiction as referred to above. By virtue of the said fiction, the question of formation of opinion by the Government under Section 10(1) of the Act that an industrial Dispute exists or is apprehended, cannot arise in cases falling under Section 2-A of the Act. However, the language of Section 10(1) of the Act continues to be unaltered even after the introduction of Section 2-A of the Act. Nor the provisions of Section 12(5) of the Act have been interfered with. A reading of Section 10(1) and Section 12(5) of the Act makes it clear that the appropriate Government has a discretion in decide whether a reference should be made or not even in cases where an industrial dispute exists is apprehended."

In the same Judgment in Paragraph 32, the Division Bench of this Court has held as follows:

"On a final analysis, the following principles emerge:-

- 1) The Government would normally refer the dispute for adjudication;
- 2) The Government may refuse to make reference ,if-
 - a) the claim is very stale;
 - b)the claim is opposed to the provisions of the Act;
 - c)the claim is inconsistent with any agreement between the parties;
 - d) the claim is patently frivolous;
 - e) the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse;
 - f)the person concerned is not a workman as defined by the Act;
- 3) The Government should not act on irrelevant and extraneous considerations;

- 4) The Government should act honestly and bona fide;
- 5) The Government should not embark on adjudication of the dispute and
- 6) The Government should not refuse reference on the ground that domestic enquiry was fairly and properly held and punishment awarded was appropriate."

The Division Bench of this Court has thus clearly held that if the claim is very stale and patently frivolous, the Government may refuse to make a reference. In the case on hand, the petitioner having resigned from the job and having accepted the terminal benefits in the year 1997 has come forward to seek re-employment, after two years. To prove that he was mentally ill during that period, no documents were produced before the first respondent.

17. The learned counsel appearing for the third respondent relied on a decision reported in *Secretary, Indian Tea Association vs- Ajit Kumar Barat and others* (AIR 2000 Supreme Court 915) wherein in paragraph 9, their Lordships have held as follows:

"Before making a reference under S.10 of the Act the appropriate Government has to form an opinion whether an employee is a workman and thereafter has to consider as to whether an industrial dispute exists or is apprehended."

The said Judgment clearly makes out that the High Court while dealing with the writ petition under Article 226 of the Constitution of India could issue mandamus only if the Government has taken into account any irrelevant or foreign material. The other main point that has to be seen in the case on hand is that whether the petitioner can be considered as a "workman" at all as defined under Section 2(s) of the Act. Section 2(s) of the Act defines "workman" which runs as follows:

"Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute; or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

- (i) who is subject to the Air Force Act 1950 (45 of 1950), or the Army Act 1950, (46 of 1950) or the Navy Act, 1957 (62 of 1957); or
- (ii) who is employed in the police service or as an officer or other employee of a prison, or
- (iii) who is employed mainly in a managerial or administrative capacity, or
- (iv) who, being employed in a supervisory capacity,

draws wages exceeding one thousand six hundred rupees per mensem or ex exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

The petitioner does not fit into any category as mentioned in the said provision. The resignation by the petitioner brings about complete cessation of master and servant relationship between the third respondent and the petitioner. Hence the petitioner cannot at all be termed as "workman" within the meaning of Section 2(s) of the Act.

18. On a fair reading of provision under Section 2(s) of the Act, it is clear that the workman means any person employed in any industry to do manual, unskilled, skilled, technical or operational, clerical or supervisory work for hire or reward including any such person who has been dismissed , discharged or retrenched. The said provision does not include a person who has submitted the resignation and received the entire terminal benefits.

19. From the discussion made above, I can only come to the irresistible conclusion that the petitioner has not made out any case for setting aside the order of the first respondent dated 5.1.2001.

20. In the result, the writ petition stands dismissed. However, there is no order as to costs.

sg

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1. Secretary to Government
Union of India
Ministry of Labour,
New Delhi

2. Assistant Labour Commissioner(C) I,
Office of the Regional Labour
Commissioner (Central)
26,Haddows Road, "Shastri Bhavan"
Chennai-600 006

3. Assistant General Manager
State Bank of India
No.21, Rajaji Road,
Chennai-600 001

+ One cc to Mr. K.s. Sundar Advocate SR 29574

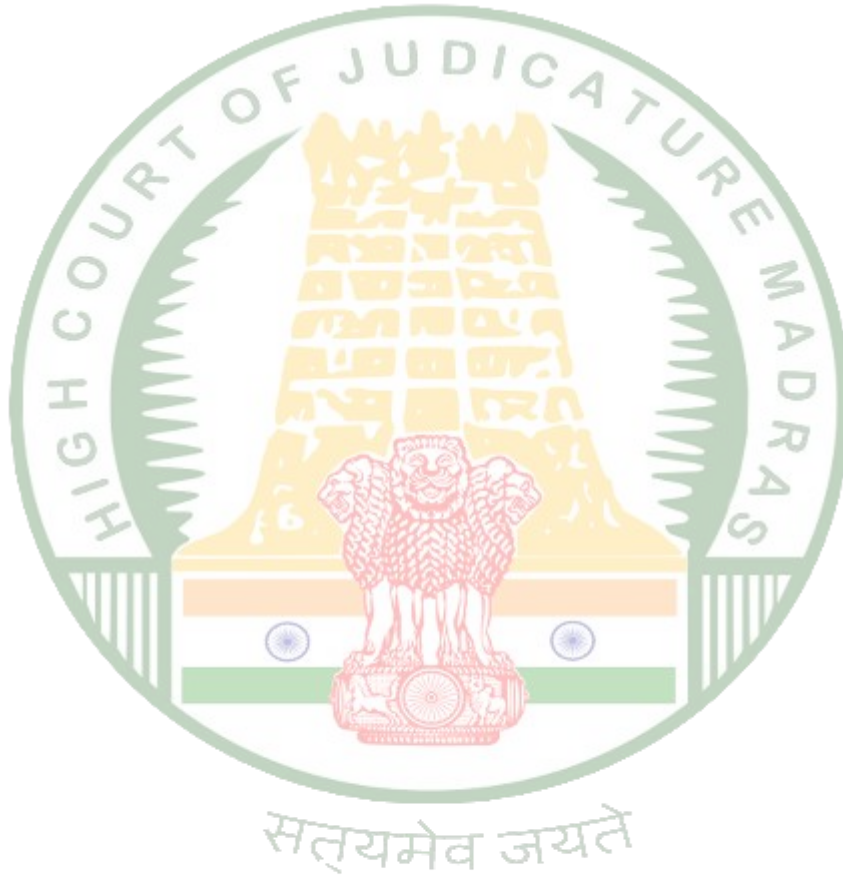
+ One cc to Mr. Balan Haridas Advocate sR 29112

MDR (co)

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